

Message Text

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ORIGIN PM-04

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R 260344Z FEB 76

FM SECSTATE WASHDC

TO AMEMBASSY JIDDA

INFO AMEMBASSY SANA

SECDEF

C O N F I D E N T I A L STATE 045897

E.O. 11652: GDS

TAGS: MASS, SA, YE, US

SUBJECT: THIRD COUNTRY TRANSFER PROCEDURES

1. DURING RECENT VISIT OF DOD TEAM, TEAM LEADER FIFER
PROMISED DAHIRI A MEMORANDUM DETAILING THIRD PARTY TRANSFER
PROCEDURES. EMBASSY SHOULD PASS FOLLOWING TO DAHIRI.

2. BEGIN UNCLASSIFIED. USG PROCEDURES GOVERNING THIRD
PARTY TRANSFERS OF US DEFENSE ARTICLES ARE BASED UPON US
LAW AND ADMINISTRATIVE REGULATIONS. THE BASIC STATUTORY
PROVISIONS RELATING TO SUCH TRANSFERS ARE FOUND IN
SECTION 505(E) OF THE FOREIGN ASSISTANCE ACT (FAA) OF
1961, AS AMENDED, WITH RESPECT TO US DEFENSE ARTICLES
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PROVIDED UNDER THE MILITARY ASSISTANCE PROGRAM (MAP), AND
SECTION 3(A) OF THE FOREIGN MILITARY SALES ACT (FMSA),
AS AMENDED, WITH RESPECT TO US DEFENSE ARTICLES SOLD UNDER
FOREIGN MILITARY SALES (FMS) PROCEDURES. BOTH SECTIONS

CONTAIN IDENTICAL LANGUAGE AS FOLLOWS: "IN CONSIDERING A REQUEST FOR APPROVAL OF ANY TRANSFER OF ANY WEAPON, WEAPONS SYSTEM, MUNITIONS, AIRCRAFT, MILITARY BOAT, MILITARY VESSEL, OR OTHER IMPLEMENT OF WAR TO ANOTHER COUNTRY, THE PRESIDENT SHALL NOT GIVE HIS CONSENT... TO THE TRANSFER UNLESS THE UNITED STATES ITSELF WOULD TRANSFER THE DEFENSE ARTICLE UNDER CONSIDERATION TO THAT COUNTRY, AND PRIOR TO THE DATE HE INTENDS TO GIVE HIS CONSENT TO THE TRANSFER, THE PRESIDENT NOTIFIES THE SPEAKER OF THE HOUSE OF REPRESENTATIVES AND THE COMMITTEE ON FOREIGN RELATIONS OF THE SENATE IN WRITING OF EACH SUCH INTENDED CONSENT, THE JUSTIFICATION FOR GIVING SUCH CONSENT, THE DEFENSE ARTICLE FOR WHICH HE INTENDS TO GIVE HIS CONSENT TO BE SO TRANSFERRED, AND THE FOREIGN COUNTRY TO WHICH THAT ARTICLE IS TO BE TRANSFERRED. IN ADDITION, THE PRESIDENT SHALL NOT GIVE HIS CONSENT... TO THE TRANSFER OF ANY SIGNIFICANT DEFENSE ARTICLES ON THE UNITED STATES MUNITIONS LIST UNLESS THE FOREIGN COUNTRY REQUESTING CONSENT TO TRANSFER AGREES TO DEMILITARIZE SUCH DEFENSE ARTICLES PRIOR TO TRANSFER, OR THE PROPOSED RECIPIENT COUNTRY PROVIDES A COMMITMENT IN WRITING TO THE UNITED STATES GOVERNMENT THAT IT WILL NOT TRANSFER SUCH DEFENSE ARTICLES, IF NOT DEMILITARIZED, TO ANY OTHER FOREIGN COUNTRY OR PERSON WITHOUT FIRST OBTAINING THE CONSENT OF THE PRESIDENT."

3. THE ABOVE QUOTED SECTIONS OF THE FAA AND THE FMSA WOULD APPLY TO ALMOST ALL THIRD-PARTY TRANSFERS OF MAP-ORIGIN (FAA) OR FMS-ORIGIN (FMSA) DEFENSE ARTICLES. (EVEN WITH RESPECT TO THOSE LIMITED CATEGORIES OF DEFENSE ARTICLES WHERE SUCH PROCEDURES ARE NOT APPLICABLE, US CONSENT NEVERTHELESS REMAINS A REQUIREMENT UNDER US LAW AND BILATERAL AGREEMENTS.) FOR EXAMPLE, IF THE UNITED STATES PROVIDES A MILITARY AIRCRAFT TO A COUNTRY EITHER THROUGH MAP OR THROUGH FMS, THEN THE PROVISIONS OF THESE SECTIONS MUST BE FOLLOWED. THIS MUST ALSO BE DONE IN THE CASE OF LICENSED PRODUCTION ABROAD OF US-ORIGIN
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DEFENSE ITEMS, IF THE END ITEM INCORPORATES DEFENSE ITEMS OF MAP OR FMS ORIGIN. AS A MATTER OF POLICY, THE SAME CRITERIA AND PROCEDURES ARE FOLLOWED WITH RESPECT TO FMS-FINANCED ITEMS. MOREOVER, THESE REQUIREMENTS MUST BE MET REGARDLESS OF HOW MANY TIMES AN ITEM MAY BE TRANSFERRED.

4. WHILE BOTH THE FMSA AND THE FAA CONTAIN IDENTICAL LANGUAGE ON THIRD-PARTY TRANSFERS, THERE IS AN ADDITIONAL STATUTORY REQUIREMENT RELATING TO MAP GRANT-ORIGIN ITEMS WHICH AFFECTS THEIR PROCESSING IN SUCH TRANSFER CASES. SECTION 505(A)(4) OF THE FAA STIPULATES THAT EACH MAP RECIPIENT MUST AGREE THAT "UNLESS THE PRESIDENT CONSENTS TO OTHER DISPOSITION, IT WILL RETURN TO THE UNITED STATES

GOVERNMENT FOR SUCH USE OR DISPOSITION AS THE PRESIDENT CONSIDERS IN THE BEST INTERESTS OF THE UNITED STATES, SUCH ARTICLES WHICH ARE NO LONGER NEEDED FOR THE PURPOSES FOR WHICH FURNISHED." AS THE FOREGOING SUGGESTS, MAP RECIPIENTS COULD BE AUTHORIZED TO DISPOSE OF MAP EXCESS ITEMS DIRECTLY, ONCE OTHER PERTINENT STATUTORY REQUIREMENTS SUCH AS THOSE CONTAINED IN SECTION 505(E) OF THE FAA ARE MET. IN PRACTICE, HOWEVER, IT IS USG POLICY TO REGAIN TITLE TO MAP EXCESS TO THE MAXIMUM EXTENT PRACTICABLE, PARTICULARLY IN THIRD-PARTY TRANSFER CASES INVOLVING SIGNIFICANT DEFENSE ARTICLES IN BETTER-THAN-SCRAP CONDITION. PROCEDURALLY, MAP-ORIGIN EQUIPMENT DECLARED EXCESS BY A FOREIGN COUNTRY IS REPORTED TO THE APPROPRIATE US MILITARY DEPARTMENT FOR SCREENING AGAINST THE LATTER'S REQUIREMENTS OR AGAINST THE US GOVERNMENT'S WORLDWIDE MAP NEEDS. ITEMS THAT SURVIVE THIS SCREENING ARE OFFERED TO FOREIGN COUNTRIES EITHER BY SALE (FMS) OR GRANT (MAP REDISTRIBUTION) THROUGH THE MAJOR ITEMS EXCESS (MIMEX) SYSTEM. IF THE ITEMS ARE NOT ACCEPTED, THEY ARE REPORTED TO THE APPROPRIATE DEFENSE PROPERTY DISPOSAL REGION. UNDER THE ABOVE PROCEDURES, THE UNITED STATES GOVERNMENT ITSELF PROVIDES THE EQUIPMENT CONCERNED TO THE PROPOSED RECIPIENT, AND THERE IS NO THIRD-PARTY TRANSFER. THE ONLY OCCASION FOR A NORMAL THIRD-PARTY TRANSFER OF MAP-ORIGIN US DEFENSE ARTICLES, COMPARABLE TO THAT FOR FMS-ORIGIN ARTICLES, IS IF THE MAP ARTICLES ARE SCRAP, OR IF THE MAP RECIPIENT HAS PURCHASED THE RESIDUAL RIGHTS TO THE MATERIEL, IN WHICH CASE THE PROPOSED TRANSFER

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IS TREATED PROCEDURALLY THE SAME AS FMS-ORIGIN ITEMS.

5. A FINAL STATUTORY REQUIREMENT RELATING TO THIRD-PARTY TRANSFERS OF MAP-ORIGIN US DEFENSE ARTICLES IS THAT CONTAINED IN SECTION 505(F) OF THE FAA WHICH PROVIDES AS AN ADDITIONAL CONDITION OF MAP ELIGIBILITY COMMENCING JULY 1, 1974, THAT EACH PROPOSED MAP RECIPIENT "SHALL HAVE AGREED THAT THE NET PROCEEDS OF SALE RECEIVED BY SUCH COUNTRY IN DISPOSING OF ANY WEAPON, WEAPONS SYSTEM, MUNITION, AIRCRAFT, MILITARY BOAT, MILITARY VESSEL, OR OTHER IMPLEMENT OF WAR RECEIVED UNDER (MAP) WILL BE PAID TO THE UNITED STATES GOVERNMENT....". THIS SECTION DOES NOT AFFECT THE REQUIREMENTS OF SECTION 505(E) OF THE FAA NOR DOES IT ALTER THE PROCEDURES DESCRIBED IN PARAGRAPH 4 ABOVE. IT DOES, HOWEVER, EXTEND TO DISPOSALS BY MAP RECIPIENT COUNTRIES OF MAP-ORIGIN DEFENSE ARTICLES IF SUCH COUNTRIES ARE TO RETAIN THEIR MAP ELIGIBILITY AFTER JULY 1, 1974, REGARDLESS OF WHEN THE ARTICLES INVOLVED WERE ORIGINALLY FURNISHED TO ANY SUCH COUNTRY.

6. THE NEED FOR RECIPIENTS OF US DEFENSE ARTICLES, REGARDLESS OF WHETHER SUCH ARTICLES WERE PROVIDED UNDER

MAP, FMS, OR PURELY COMMERCIAL AUSPICES, TO OBTAIN ADVANCE
USG APPROVAL BEFORE TRANSFERRING ANY ARTICLES TO THIRD-
PARTIES IS CLEARLY STATED IN THE RELEVANT AGREEMENTS OR
DOCUMENTS PERTAINING TO THE PROVISION OF THE EQUIPMENT.
BILATERAL AGREEMENTS BETWEEN THE USG AND EACH MAP
RECIPIENT INCLUDE LANGUAGE GOVERNING THE DISPOSAL OF MAP
ARTICLES FOUND TO BE EXCESS TO THE NEEDS OF THE RECIPIENT.
THE REQUIREMENT TO OBTAIN ADVANCE USG APPROVAL BEFORE
TRANSFERRING FMS-ORIGIN DEFENSE ARTICLES TO THIRD-PARTIES
IS COVERED IN THE TERMS AND CONDITIONS LISTED ON THE
LETTER OF OFFER AND ACCEPTANCE (LOA-DD FORM 1513) WHICH
IS SIGNED BY A REPRESENTATIVE OF THE PURCHASING GOVERN-
MENT AND WHICH SERVES AS THE CONTRACT FOR EACH SALE UNDER
THE FMSA. RECIPIENTS OF SIGNIFICANT DEFENSE ARTICLES ON
THE US MUNITIONS LIST OBTAINED THROUGH PURELY COMMERCIAL
PROCEDURES AGREE, BY SIGNING THE CONSIGNEE-PURCHASER
STATEMENT (FORM DSP-83), TO OBTAIN ADVANCE USG WRITTEN
APPROVAL BEFORE TRANSFERRING SUCH ARTICLES TO THIRD-
PARTIES.

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7. THE THREE KEY ELEMENTS OF SECTIONS 505(E) AND 3(A)
ARE: 1) WHETHER THE US ITSELF WOULD TRANSFER THE ITEM
TO THE COUNTRY INVOLVED; 2) ADVANCE NOTIFICATION OF
THE CONGRESS IF A TRANSFER IS TO BE APPROVED; AND
3) DEMILITARIZATION OR THE RECEIPT IN ADVANCE OF APPROVAL
OF WRITTEN TRANSFER ASSURANCES FROM THE RECIPIENT COUNTRY
WITH RESPECT TO "SIGNIFICANT DEFENSE ARTICLES ON THE
UNITED STATES MUNITIONS LIST". UNDER THE FIRST ELEMENT,
A PROPOSED TRANSFER RECIPIENT MAY BE STATUTORILY
INELIGIBLE UNDER THE FAA OR THE FMSA TO RECEIVE ANY OR
CERTAIN DEFENSE ARTICLES DIRECTLY FROM THE US, OR WE
MAY WISH ON POLICY GROUNDS NOT TO PROVIDE US-ORIGIN
DEFENSE ARTICLES TO THE PROPOSED RECIPIENT. IN EITHER
SITUATION, SINCE WE WOULD NOT OURSELVES TRANSFER DEFENSE
ARTICLES TO THE COUNTRY CONCERNED, WE COULD NOT LEGALLY
APPROVE A THIRD PARTY TRANSFER TO THAT COUNTRY.

THE REQUIREMENT TO NOTIFY THE CONGRESS IN ADVANCE OF OUR
APPROVING THIRD-PARTY TRANSFERS WAS ADDED TO THE FAA AND
THE FMSA BY THE FOREIGN ASSISTANCE ACT OF 1973.
PREVIOUSLY, THE CONGRESS HAD REQUESTED ONLY SEMI-ANNUAL
REPORTS OF SUCH TRANSFERS.

THE THIRD-PARTY TRANSFER ASSURANCES REQUIRED FROM THE
PROPOSED RECIPIENT MUST, AS REQUIRED BY THE FAA AND FMSA,
BE: A) PROVIDED IN WRITING; B) GIVEN TO THE UNITED STATES
GOVERNMENT; AND C) OBTAINED PRIOR TO THE APPROVAL OF THE
TRANSFER.

8. THE ABOVE STATUTORY REQUIREMENTS DO NOT APPLY AS A
MATTER OF LAW TO STRICTLY COMMERCIAL SALES OF DEFENSE

ARTICLES BY US SOURCES. NEVERTHELESS, WE DO, AS A MATTER OF POLICY AND ADMINISTRATIVE REGULATION, APPLY THE SAME CRITERION WITH RESPECT TO THIRD-PARTY TRANSFER ASSURANCES FOR SIGNIFICANT DEFENSE ARTICLES. THE LATTER POINT IS ALWAYS COVERED IN MANUFACTURING LICENSING AGREEMENTS OR EXPORT DOCUMENTS APPROVED BY THE USG.

9. THE QUESTION OF WHAT CONSTITUTES A "SIGNIFICANT DEFENSE ARTICLE ON THE U.S. MUNITIONS LIST" IS DEFINED
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IN FOOTNOTES TO SECTIONS 123.10(D) AND 124.10(M)(2), INTERNATIONAL TRAFFIC IN ARMS REGULATIONS (FYI SEE 10 FAM 180, APPENDIX A. END FYI) COPIES OF THESE REGULATIONS MAY BE PURCHASED FROM THE US GOVERNMENT PRINTING OFFICE. EXPERIENCE HAS SHOWN THAT MOST THIRD-PARTY TRANSFER REQUESTS INVOLVE OBVIOUSLY SIGNIFICANT ITEMS, SUCH AS THE ITEMS ENUMERATED IN THE FIRST SENTENCE OF SECTION 3(A) OF THE FMSA QUOTED ABOVE. WHERE ANY DOUBT EXISTS, THE COUNTRY PROPOSING TO TRANSFER THE ITEM SHOULD REQUEST CLARIFICATION FROM THE USG.

10. THE COUNTRY PROPOSING TO TRANSFER THE ARTICLES CONCERNED SHOULD INITIATE ACTION BY REQUESTING THE USG TO APPROVE THE PROPOSAL. THE DEPARTMENT OF STATE EXERCISES THE PRESIDENT'S RESPONSIBILITIES WITH RESPECT TO THIRD-PARTY TRANSFERS. A REQUEST TO TRANSFER DEFENSE ARTICLES SHOULD THEREFORE BE SENT TO THE DEPARTMENT OF STATE WITH THE DEPARTMENT OF DEFENSE INFORMED. THE DEPARTMENT OF STATE WILL REACH A DECISION IN CONSULTATION WITH THE DEPARTMENT OF DEFENSE AND INFORM THE CONGRESS (IF APPLICABLE) IF THE DECISION IS AFFIRMATIVE. AFTER A COURTESY WAITING PERIOD OF ABOUT TEN DAYS FOLLOWING NOTIFICATION OF THE CONGRESS, WE WILL THEN INFORM THE COUNTRY REQUESTING APPROVAL TO TRANSFER THAT WE INTEND TO SO APPROVE, CONTINGENT UPON OUR RECEIPT OF THE REQUIRED TRANSFER ASSURANCES FROM THE PROSPECTIVE RECIPIENT. THE US WILL TAKE CARE OF OBTAINING THE ASSURANCES THROUGH OUR EMBASSY IN THAT COUNTRY. AFTER SUCH ASSURANCES ARE RECEIVED AND IT IS DETERMINED THAT THEY MEET THE REQUIREMENTS OF US LAW AND REGULATIONS, WE WILL THEN NOTIFY THE COUNTRY REQUESTING THE APPROVAL TO TRANSFER THAT FINAL APPROVAL HAS BEEN GRANTED. END UNCLASSIFIED.

11. IN PRACTICE, IF THE SAG DESIRES TO TRANSFER A PARTICULAR US DEFENSE ARTICLE TO YARG, THE FOLLOWING SCENARIO SHOULD BE FOLLOWED: SAG SHOULD SUBMIT TRANSFER REQUEST IN WRITING TO AMEMBASSY JIDDA (PREFERABLY BY DIPLOMATIC NOTE FROM THE MINISTRY OF FOREIGN AFFAIRS) LISTING THE EQUIPMENT THAT SAG WISHES TO TRANSFER, HOW AND WHEN IT OBTAINED THE EQUIPMENT FROM THE US, AND LISTING THE INTENDED RECIPIENT. EMBASSY JIDDA SHOULD

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SUBMIT THE REQUEST TELEGRAPHICALLY TO THE DEPARTMENT,
WITH SECDEF AND AMEMBASSY SANAA AS INFO ADDRESSEES. IF
WE INTEND TO APPROVE THE REQUESTS, THE DEPARTMENT WILL
NOTIFY CONGRESS AND REQUEST EMBASSY SANAA TO OBTAIN
ASSURANCES FROM THE YARG. AFTER OBTAINING THESE WRITTEN
ASSURANCES, EMBASSY SANAA SHOULD NOTIFY THE DEPARTMENT
TELEGRAPHICALLY AND SEND A COPY TO THE DEPARTMENT:
PM/SAS. THE DEPARTMENT WILL THEN AUTHORIZE EMBASSY JIDDA
TO INFORM THE SAG THAT THE REQUEST HAS BEEN APPROVED.
TRANSFER MAY THEN BE EFFECTED. KISSINGER

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<< END OF DOCUMENT >>

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